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No._____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HAROL WHITLEY, et al., Petitoner,

v.

WARREN ROBERT STANDEN, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANNY A. FORSMAN
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for the District of Nevada

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QUESTION PRESENTED

Whether the court of appeals properly concluded that the constitutional error at trial had a "substantial and injurious effect" on the verdict, given the overwhelming prejudice caused by the uninvited error in the admission at trial of evidence of the defendant's previous involuntary guilty plea to the charged offense and in light of its review of the record as a whole.

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I.

INTRODUCTION

The procedural record of this case, is generally described in the Petition for Writ of Certiorari. The Ninth Circuit Court of Appeals, in Standen v. Whitley, 994 F.2d 1417 (9th Cir. 1993), after a careful and thoughtful review of the record ordered that a writ of habeas corpus be granted because Standen did not receive a constitutionally fair trial. Standen was tried in the state of Nevada for first degree murder in July and August of 1984. The state sought the death penalty against Standen. However, after the penalty phase the jury sentenced him to two consecutive sentences of life without the possibility of parole. The constitutional error at trial consisted of the trial judge's decision to instruct Standen's jury that his prior involuntary plea of guilty to the murder could be used against him as substantive evidence of guilt. Adhering to the rule announced in Brecht v. Abrahamson, ____ U.S. ____, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the Ninth Circuit characterized this mistake by the trial judge as an error of constitutional magnitude and held as follows:

> After a thorough review of the record we are convinced that the use of the guilty plea as evidence had substantial and injurious effect or influence in determining the jury's verdict. 994 F.2d 1426.

The decision of the Court of Appeals fairly portrays a summary of the evidence presented during Standen's prosecution. It also presents a cogent and lucid depiction of the events and procedural

circumstances leading up to the trial judge's erroneous decision to instruct the jury both during the trial and at the time of his final charge; that Standen's prior involuntary plea of guilty could be used as evidence to convict him for murder. Therefore, it is unnecessary to reiterate the factual and procedural history at length in this Brief in Opposition to Petition for Certiorari.

However, the petitioner, in its STATEMENT OF THE CASE has failed to present a complete rendition of the record. Because of this, a brief discussion of the facts is necessary in order for this Court to fully understand the basis for the lower court's decision.

Finally, the petitioner seeks relief from this Court and cites two reasons justifying their request. Standen respectfully submits that neither reason warrants or compels a review of the decision below.

II.

STATEMENT OF THE CASE

The recitation of the facts set out in the petition contains several incomplete characterizations of the record below. It would be unnecessarily repetitive to review the entire trial by way of summary herein. Therefore, the following review of certain portions of the record should serve only as a rebuttal to the petitioner's version of the record below.

To begin with, the petitioner incorrectly states that, "Fingerprints were also present, but were of insufficient quality to allow for comparisons." Petition (Pet.) at 5. In fact, on July

18, 1984, state witness John T. Westwood, a fingerprint expert, testified that he lifted 20 latent fingerprints from the victim's car. R. Volume (V.) II, Trial date (t.d.) July 16, 1984 at 129-195. He testified that he was not able to identify the remaining prints as belonging to Standen. Id. Moreover, this same witness testified that he lifted twelve other latent prints from evidence not found in the car and that those fingerprints did not belong to Standen. Id. Westwood's testimony was corroborated by witness Jeffrey Wise. R.V.XII, t.d. August 2, 1984 at 111-114.

The next incomplete factual assertion deals with the petitioner's contention that semen found during the victim's autopsy indicated that "Standen could have been the donor." Pet. at 5&6. The petitioner neglects to apprise this Court that the trial testimony of Enrico Tognieri, indicated that the semen was attributable to a Type A secretor and that although Standen was a Type A secretor so were 32% of the entire male population. R.V. VIII, t.d. July 27, 1984 at 122. This fact was not lost on the court of appeals. 994 F.2d at 1420.

The petitioner also asserts that pubic and head hair found at the crime scene and in the car were consistent with Standen's. Pet. at 6. The witness that provided this testimony for the state was David Atkinson, an employee of the County Criminalistic Lab. R.V. VII, t.d. July 26, 1984 at 62-115 and R.V. VII, t.d. July 27, 1984 at 2-37. He testified that there were no tests available to allow a scientist to determine that a particular hair came from a

particular person. On cross-examination he admitted that he had very little training in hair comparison and that he usually ends his reports with a disclaimer indicating that hairs do not possess adequate characteristics to do a valid comparison. R.Id. He admitted that he was not sure if the hair found in the car (head hair) or the public hair was Standen's. Id. He could not even be sure as to what race the owner of the hair belonged to. R.Id. He conceded that this type of analysis was highly subjective. Finally, he testified that other hairs, not belonging to Standen were found in the car. Id.

The petitioner observed that when Standen was arrested he had, in his personal effects, "a buck knife which a forensic pathologist suggested could have been the murder weapon." Pet. at 8. What the petitioner does not explain is that the knife was not in any way, forensic or otherwise, linked to Danner's murder. Moreover, the petitioner neglected to advise this Court that a pair of scissors was found in Danner's car (R.V.II,t.d. July 16, 1984 at 177) which, according to a state witness, could have been the murder weapon. R.V.III,t.d. July 18, 1984 at 283. However, no evidence was presented, forensic or otherwise, linking Standen to the scissors.

It is important to note that Standen's trial attorney attempted to dismiss the prosecution prior to trial based on the state's failure to preserve the semen swabs collected during Danner's autopsy. R.V.II,t.d. July 16, 1984 at 5. It was conceded by the state, the prior prosecutor (who testified at a hearing outside the

presence of the jury regarding this issue) (R.V.II,t.d. July 18, 1984 at 67), and the trial judge (R.V.VIII,t.d. July 27, 1984 at 14); that the semen evidence was consumed by testing prior to Standen's original plea of guilty. Therefore, any cross-examination on this issue could not have possibly been intended as an attempt to invite error because the issue of the exhaustion of the semen sample had nothing to do with Standen's earlier plea of guilty.

Finally, although the following is accurately described in the opinion below, because it was overlooked by the petitioner in its statement of facts, Standen believes it bears mentioning again. The trial judge instructed the jury both during the trial as well as in the body of instructions that Standen's prior guilty plea could be used as evidence of guilt against him. Standen's jury was instructed in this manner, by the trial judge, on no less than three occasions.

III.

ARGUMENT

A) INTRODUCTION

The Ninth Circuit Court of Appeals was the first court to conduct the type of review compelled by Brecht. The court conducted "a de novo examination of the trial record" in order to ensure "that 'the error did not influence the jury' . . . and that 'the judgment was not substantially swayed by the error.'" 113 S.Ct. 1723, 1724 (Stevens, J., concurring), citations omitted. Their review led them to an abiding conclusion that Standen did not receive a fair trial.

The petitioner contends that this conclusion is in conflict with that of four other courts that previously reviewed the record. This proposition is without legitimacy because each of those courts (state trial judge, Nevada Supreme Court, federal magistrate-judge, and federal district judge) conducted the wrong type of review. This error is succinctly observed in the concurring opinion of Judge Nelson in the decision below. He observed that although his review of the record led him to conclude that Standen was guilty, he conceded that it was the jury's province to reach that result. 994 F.2d 1426, (Nelson, J., concurring). Therefore, because "its verdict was tainted by a trial error unique in the history of the common law . . ." Judge Nelson agreed that Standen deserved a new trial. Secondly, Judge Nelson pointed out that the reason this wrong took so long to be righted rested with each previous court's inability to apply the correct standard of review. He stated as follows:

> Second, the State of Nevada is now faced with the practical problem of trying to assemble a new trial fifteen years after the crime was committed. The prosecution, defense counsel and the trial judge make up the first line of defense established by our system for the protection of an accused's rights. Their failures in Standen's case were basic and repeated. However, when the Nevada Supreme Court had the chance to correct the error in 1985, it applied the wrong test. There was substantial evidence to support the verdict. Unfortunately, this was not the question which was posed by Standen, but it was the one which that Court answered. Id.

Unfortunately, the federal courts of Nevada conducted the same

type of sufficiency of the evidence review of the record and concluded that Standen received a fair trial.

The Ninth Circuit was the only court to follow the rule in Brecht and correctly concluded that the constitutional error in this case compelled a new trial.

The petitioner identifies two reasons in support of its request for certiorari. Neither contention has merit.

B) THE ERROR COMMITTED BY THE TRIAL JUDGE CANNOT BE EXCUSED UNDER THE DOCTRINE OF "INVITED ERROR"

The first reason submitted by the petitioner is its belief that the opinion below stands for the proposition that error invited by the accused cannot be later used as a reason for relief from a criminal conviction. This argument was raised by the petitioner below and summarily dealt with in Judge Noonan's opinion. Writing for the majority he held as follows:

> That the tactics of Standen's counsel had provoked the trial court into allowing the plea in evidence, that the court's error can thus be catalogued as invited, does not mitigate what was done. The defendant is bound by his counsel's strategic decisions. United States v. Martinez, 883 F.2d 750, 755 (9th Cir. 1989), **vacated on other grounds** 928 F.2d 1470 (9th Cir. 1991). But counsel's strategy cannot be held to have acted as a waiver of Standen's right to a fair trial by jury, **cf.**, Carnley v. Cochran, 369 U.S. 506, 516 (1962); and the state does not contend that it does. Id. at 1422.

The petitioner suggests that the opinion below is "in conflict with other circuits respecting invited error." Pet. at 16. A review of each of the cases cited for this proposition reveals the

transparency of the argument.

Johnson v. United States, 318 U.S. 189 (1942) is not on point with this case. The Johnson case dealt with a situation wherein a defendant testified at his tax evasion trial. During his testimony he asserted his Fifth Amendment privilege and the trial judge permitted him to refrain from testifying. 318 U.S. at 191-193. During his summation the prosecutor committed trial error when he commented on the defendant's refusal to testify. Id. However, defense counsel "expressly waived any objection to the prosecutor's comments by withdrawing his exception to it and by acquiescing in the treatment of the matter by the court." Id. The court held that an express waiver of a trial error precluded review of that error on appeal. The Johnson decision has no similarity to the facts in Standen's case. It did not present the type of constitutional error that is the subject of this case. The rule in Johnson does not stand for a lawyer's ability to waive his client's right "to a fair trial by jury." Standen, 994 F.2d at 1422.

In United States v. Garrett, 727 F.2d 1003, 1012 (11th Cir. 1984), (citations omitted), the Eleventh Circuit held that:

> If the defendant admits, or the government plainly demonstrates, that at the time of the waiver the defendant was not ignorant of his jury right and consented to the waiver, reversal would not be in order, for the defendant cannot complain on appeal of an alleged error invited or induced by himself.

In Garrett, the record was silent on this issue and the court remanded the case back to the trial court for an evidentiary

hearing. Id. at 1013. Garrett has no application to this case.

Garrett does not provide authority for the proposition that an attorney can waive his client's right to a fair and impartial jury trial. The Ninth Circuit's decision in the case below properly identified this rule and properly dismissed any argument of waiver or invited error. 994 F.2d. at 1422.

In United States v. Page, 661 F.2d 1080, 1082 (5th Cir. 1981) the defendant, a person holding a doctoral degree and formerly employed as a professor of biology, was accused of fraud. His only claim on appeal was that he did not waive, in writing, his right to a jury trial pursuant to Fed.R.Crim.P. 23(a). The Fifth Circuit held that, under the facts of the case, it was obvious that the accused actively participated in the decision to proceed without a jury and that the decision was tactical. Id. at 1082-1083.

The same cannot be said to have occurred in Standen's case. Standen possessed an IQ of 65 and was practically retarded. The record below does not even hint at the possibility that Standen participated in some plan to create error at trial in order to profit from it on appeal or collateral review. The Page case is inapposite to the error that was committed below.

Finally, United States v. Pina, 844 F.2d 1, 8 (1st Cir. 1988), is a case in which the accused, himself at trial, opened the door to other crimes evidence. 844 F.2d at 8. On appeal, the First Circuit held that the accused was foreclosed from complaining about this evidentiary ruling because he initiated the line of questioning

causing it to become relevant. Id. Pina is not a case in which the trial error rose to constitutional magnitude. Brecht, 113 S.Ct. at 1722. It is not a case wherein a trial judge advised a jury that a prior involuntary plea of guilty could be used as evidence of guilt in the subsequent trial. It has no application to this case.

The petitioner obliquely contends that Standen's trial attorney was motivated by strategy or tactics to lure the trial judge into committing the egregious constitutional error that formed the basis for relief below. However, when Standen's attorney testified at Standen's state habeas corpus evidentiary hearing, he denied that he intended to invite such error through any strategic or tactical designs. R. Evidentiary Hearing, March 18, 1988 at 4-46.

The mistake that was made by the trial judge cannot be rationalized or forgiven by blaming Standen's lawyer. When faced with having to resolve the evidentiary issue presented to him by two adversaries fighting to win a murder trial the judge selected a remedy that would serve to debilitate Standen's ability to obtain a fair jury trial and essentially guarantee a conviction for the state. There were a myriad of less harsh solutions that were either not considered or completely rejected. This case is unique in the annals of criminal law. No case compares to the error committed by the trial judge. The Ninth Circuit said it best when it began the legal analysis for the decision below as follows:

> If no such case exists, it is because it contradicts the character of a trial to ask a jury to consider a defendant's guilt in terms

> of specific testimony and also in terms of his own plea of guilty. . . .A fair trial cannot be had if a jury must weigh with all the other evidence, pro and con, the one overwhelming piece of evidence: the defendant pleaded guilty. 994 F.2d at 1422.

C) THE NINTH CIRCUIT CONDUCTED A PROPER REVIEW OF THE RECORD BELOW AND THAT DECISION SHOULD NOT BE REVIEWED BY THIS COURT

The second reason the petitioner presents for a grant of certiorari consists of a complaint to this Court that the Ninth Circuit did not properly apply the Brecht standard to the case below. This assertion is yet another attempt by the state of Nevada to legitimize Standen's conviction by arguing that the evidence of guilt, separate and apart of the constitutional error, was overwhelming. The state of Nevada, once again, misapprehends the very essence of the Brecht decision which is well-stated in Justice Stevens' concurring opinion. Justice Stevens, providing the fifth vote for the majority, carefully qualified what he perceived to be the duty of the reviewing court in a case such as this. He wrote as follows:

> The purpose of reviewing the entire record is, of course, to consider all the ways that error can infect the course of a trial. Although THE CHIEF JUSTICE properly quotes the phrase applied to the errors in Kotteakos (" 'substantial and injurious effect or influence in determining the jury's verdict' "), ante, at 1714, 1716, 1722, we would misread Kotteakos itself if we endorsed only a single-minded focus on how the error may (or may not) have affected the jury's verdict. The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place.

Kotteakos is full of warnings to avoid that result. It requires a reviewing court to decide that "the error did not influence the jury," id., at 764, 66 S.Ct., at 1248, and that "the judgment was not substantially swayed by the error," id., at 765, 66 S.Ct., at 1248. In a passage that should be kept in mind by all courts that review trial transcripts, Justice Rutledge wrote that the question is not "were they [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

"This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge other's reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record." Id., at 764, 66 S.Ct., at 1248 (citations omitted).

The Kotteakos standard that will now apply on collateral review is less stringent than the Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), standard applied on direct review. Given the critical importance of the faculty of judgment in administering either standard, however, that difference is less significant than it might seem--a point well illustrated by the differing opinions expressed by THE CHIEF JUSTICE and by Justice KENNEDY in Arizona v. Fulminante, 499 U.S. ____, ____, ____, 111 S.Ct. 1246, ____, ____, 113 L.Ed.2d 302 (1991). While THE CHIEF JUSTICE considered the admission of the defendant's confession harmless error under Chapman, see 499 U.S., at ____ _ ____, 111 S.Ct., at 1255 (dissenting opinion), Justice KENNEDY's cogent analysis demonstrated that the error could not reasonably have been viewed as harmless under a standard even more relaxed than the one we announce today. See id., at

> ____ _ ____, 111 S.Ct., at 1266-1267 (opinion concurring in judgment). In the end, the way we phrase the governing standard is far less importar han the quality of the judgment with which i. .s applied. Id. at 1724-1725, (Stevens, J., concurring opinion).

This rule was not lost on Judge Nelson when he wrote, in his concurring opinion, that although the evidence was certainly sufficient to convict, the error could never be cured. 994 F.2d at 1426. The only remedy, in his opinion, was a new trial. Id. Justice Stevens' analysis has been approved and adopted by the Ninth Circuit. See, McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993). In McKinney, a case cited by the petitioner (Pet. at 22) the Ninth Circuit made the following observation:

> Like Justice Stevens, we review the trial transcript to determine *not* whether the jurors were right in their judgment, regardless of the error or its effect upon the verdict. [But] rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. . . . This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record. Id. at 1385-1386, [citations omitted].

In Jeffries v. Blodgett, ____F.3d ____, No. 91-36017, slip op. at 10284 (9th Cir. Sept. 21, 1993) the Ninth Circuit had another opportunity to apply the Brecht test for constitutional error. In that case the issue was juror misconduct. Specifically, the court was faced with whether or not a writ should issue because of allegations by the accused that his trial jurors were wrongfully

advised by a fellow juror that he had a criminal record. The court in Jeffries applied the proper de novo review and emphasized the following language from the Kotteakos decision.

> The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. Id.

The Jeffries court concluded that a remand back to the district court for an evidentiary hearing on this issue was warranted.

The petitioner latches onto language in McKinney regarding the "weighty" nature of the evidence against the accused yet never discusses how the evidence in this case overcomes the magnitude of the constitutional error committed by the trial judge. The state of Nevada is only interested in the end result; a conviction. The state of Nevada does not bother to make a legal argument justifying the unconstitutional means used to achieve that end result. The fact that the state of Nevada does not present a cogent legal argument for certiorari makes it impossible for Standen to form a legal response other than to direct this Court to the opinion below. The Ninth Circuit was the first and only court to conduct the review mandated by Brecht. There has been no compelling reason presented by the state of Nevada to disturb that decision. Therefore, it should be the last court to review this record.

CONCLUSION

Warren Standen has been in the Nevada state prison system for

approximately fifteen years. He appealed a murder conviction that was based upon an unconstitutional jury trial. He presented this issue in proper fashion to both the state and federal courts of Nevada. He did not have an attorney to assist him on his federal habeas petition and was not provided counsel until the Ninth Circuit appointed counsel to represent him on appeal of the denial of his request for a writ of habeas corpus.

Standen's efforts to obtain justice were stymied until the Ninth Circuit properly conducted the review mandated by this Court. Prior to that every other court validated his conviction after failing to apply the proper appellate or collateral standard of review. Now the state of Nevada seeks relief from a decision that is correct. The state of Nevada offers no new or compelling reason for this request. Instead it complains that because four other courts took a different approach and reached the same conclusion the Ninth Circuit's decision must be wrong. This reasoning has no legal or factual basis. It must be disregarded and rejected.

For the reasons stated in this Brief in Opposition to Petition for Writ of Certiorari, Standen would respectfully ask this Court to deny the relief sought by the state of Nevada.

Respectfully submitted,

JOHN C. LAMBROSE, Chief
Assistant Federal Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

HAROL WHITLEY, et al., Petitioner

v.

WARREN ROBERT STANDEN, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on October 19, 1993, he/she served a copy of the above and foregoing document by mailing a copy of the said document in a postage paid envelope addressed to:

District Attorney
Washoe County
Gary H. Hatlestad
Deputy District Attorney
75 Court Street, Suite 214
Reno, Nevada 89501

Pamela M. Ramage

Pamela M. Ramage